No. S218066



IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF SAN JOSE, et al.,

Defendants and Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

Respondent.

TED SMITH, an individual,

Plaintiff and Real Party in Interest.

# APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND [PROPOSED] BRIEF OF LEAGUE OF CALIFORNIA CITIES, CALIFORNIA ASSOCIATION OF SANITATION AGENCIES, AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION IN SUPPORT OF CITY OF SAN JOSE

After a Decision by the Court of Appeal
Sixth Appellate District Case No. H039498
Superior Court, Santa Clara County,
Case No. 1-09-CV-150427

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## TABLE OF CONTENTS

## TABLE OF CONTENTS
(continued)

Page

## TABLE OF AUTHORITIES

**Page**

**Federal Cases**



**State Cases**

## TABLE OF AUTHORITIES
**(continued)**

**Page**



**Federal Statutes**



**State Statutes**

## TABLE OF AUTHORITIES
**(continued)**

**Page**



**Rules**



**Constitutional Provisions**

## APPLICATION

Pursuant to California Rules of Court, rule 8.520(f), the League of California Cities (the "League"), the California Association of Sanitation Agencies ("CASA"), and the California Special Districts Association ("CSDA") (collectively, "*Amici*") respectfully apply for permission from the Chief Justice to file the *Amici Curiae* Brief contained herein in support of the City of San Jose.

The League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide—or nationwide—significance. The Committee has identified this case as having such significance.

CASA is a nonprofit mutual benefit corporation organized and existing under the laws of the State of California. CASA is comprised of 115 local public agencies throughout the State, including cities, sanitation districts, sanitary districts, community services districts, sewer districts, county water districts, California water districts, and municipal utility districts. CASA's member agencies provide wastewater collection, treatment, water recycling, renewable energy and biosolids management

services to millions of California residents, businesses, industries and institutions. CASA is advised by its Attorneys Committee, and engages in litigation of statewide significance that has the potential to yield significant benefits to, or to avoid burdens upon, a large number of CASA member agencies.

CSDA is a California non-profit corporation consisting of in excess of 1,000 special district members throughout the State. These special districts provide a wide variety of public services to both suburban and rural communities, including water supply, treatment and distribution; sewage collection and treatment; fire suppression and emergency medical services; recreation and parks; security and police protection; solid waste collection, transfer, recycling and disposal; library; cemetery; mosquito and vector control; road construction and maintenance; pest control and animal control services; and harbor and port services. CSDA monitors litigation of concern to its members and identifies those cases that are of statewide significance. CSDA has identified this case as being of such significance.

The League, CASA, and CSDA have a direct interest in the legal issues presented in this case because of the substantial, statewide implications the decision will have on the actions municipalities and other public agencies must take when responding to requests for public records under the California Public Records Act. The Court's decision could also have far reaching effects on both the rights of individual citizens to

communicate with their public officials and on individual public officials of California municipalities and other public agencies. The perspective of the League, CASA, and CSDA on this important, statewide issue will assist the Court in reaching its decision.

*Amici*'s counsel have examined the briefs on file in this case, are familiar with the issues involved and the scope of their presentation, and do not seek to duplicate that briefing. Proposed *Amici* confirm, pursuant to California Rule of Court, rule 8.520(f)(4), that no one and no party other than proposed *Amici*, and their counsel of record, made any contribution of any kind to assist in preparation of this brief or made any monetary contribution to fund the preparation of the brief.

For these reasons, the League, CASA, and CSDA respectfully request leave to file the *Amici Curiae* Brief contained herein.

Dated: July 22, 2015

BEST BEST & KRIEGER LLP

By: _____

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# I.

## INTRODUCTION AND STATEMENT OF THE CASE

The California Public Records Act ("Act") requires that "public records" be open to the public, upon request, unless there is a specific legal basis not to disclose them. (Gov. Code, § 6253(a).) The Act defines public records to include "any writing containing information relating to the conduct of the public's business *prepared, owned, used, or retained* by any state or local agency regardless of physical form or characteristics." (Gov. Code, 6252(e)), italics added.) This case presents the important question of whether the Act's definition of public records extends to writings that are not "prepared, owned, used or retained" by the local agency itself. In addition, the specific question presented arises in the context of electronic records and thus implicates the provisions of the Act that address information in an electronic format. (Gov. Code, § 6253.9.)

Respondent Superior Court of the State of California ("Trial Court") ordered Petitioner City of San Jose, et al. ("City") to provide certain public records to Plaintiff and Real Party in Interest, Ted Smith ("Mr. Smith"), who, pursuant to the Act, sought voicemails, emails, or text messages sent or received on private electronic devices used by City council members or their staff "regarding any matters concerning the City...." (1 City Petitioners' Appendix ("PA") 050.)

It appears undisputed that the "private devices" Mr. Smith targeted were neither paid for nor subsidized by the City, and the City has no ownership or possessory interest in those devices. (1PA 003, 028-029.) As such, when responding to Mr. Smith's request, the City did not reach beyond its own equipment to recover voicemails, emails, and text messages stored in Council members' private devices, such as cell phones, home computers, and tablets. (1PA 028-029.) The City also did not reach beyond its own servers to recover voicemails, emails, and text messages stored in Council members' private accounts, to which the City had no access. (1PA 028-029.)

The Court of Appeal for the Sixth Appellate District ("Appellate Court") overturned the Trial Court's decision and granted the City's writ of mandate or prohibition, which sought summary judgment in the City's favor. (*City of San Jose v. Superior Ct.* (2014) 225 Cal.App.4th 75, review granted and opn. superseded sub. nom. *City of San Jose v. Superior Ct.* (2014) 326 P.3d 976 (*Smith*).) In its ruling, the Appellate Court concluded, "[T]he Act does not require public access to communications between public officials using exclusively private cell phones or e-mail accounts." (*Id.* at p. 81.)

A plain reading of the statute directed the Appellate Court's decision. (*Id.* at p. 86 ["None of the parties' policy-based arguments informs our analysis of whether the requested communications are public

records within the meaning of section 6252. We are bound to interpret statutory language as written and avoid any encroachment on the province of the Legislature to declare public policy."].) The Appellate Court's ruling maintained the Act's express language, intent, and purpose, and correctly refrained from expanding the definition of "local agency" and "public record."

The League, CASA, and CSDA (collectively, "*Amici*") support the Act and the Appellate Court's plain reading of the statute. Indeed, the League filed an *amicus* brief in the Appellate Court supporting the City, as noted in the Appellate Court's opinion. Further, almost 50 years ago, the League served on an advisory committee to help craft the Act's enabling legislation.[1] The League and the other *Amici* organizations do *not* support an expanded interpretation of the Act that does not uphold the Act's plain language.

To the extent that this Court believes the Act needs to be revised, there are numerous policy implications of reinterpreting the law in a way that requires public employees and city council or board members to relinquish to the public the data, records, and information from private devices. These far reaching policy implications demonstrate that any

[1] The Act was enacted in 1968 via Assembly Bill 1381. (Assem. Bill No. 1381 (1967-1968 Reg. Sess.) § 39.)

reinterpretation of the Act must be accomplished through a legislative change.

The Act's reach is not, and cannot be, unlimited. The Act defines public records of a local agency such that writings made or received by a city council or board member are not subject to the Act unless they are prepared, used, owned or retained by the local agency. Adopting a view that public records includes any and all writings prepared by a public official or employee that touches on agency business—whether it be located on the agency's website or in an official's online journal—would rewrite the express language of the Act and create an unworkable standard inconsistent with our complex democratic process.

There are three specific reasons why an expanded view of a "public record" should be rejected. First, an expanded definition of "public records" is unworkable. It is administratively infeasible to require a local agency to produce what it has not prepared or used, and what it does not own or retain. Taken to its logical conclusion, public agencies would be required to search through all the private computers, devices, and accounts of their public officials and employees (including computers shared with family members) to respond to Public Records Act requests. It is unclear under what authority such searches could legally take place and whether agencies could conduct those searches without potential, costly litigation. Certainly, a city or special district could not respond to a records request

within the very short timelines contained in the Act. An expanded view of "public record" thus creates an unworkable administrative system that would not provide more access to public records.

Second, an expanded definition of "public records" is inconsistent with existing laws and our democratic process. Subjecting virtually all communications of individual public officials and employees to review under the Act is inconsistent with other transparency laws such as the Ralph M. Brown Act (Gov. Code, § 54950, et seq.), which do not extend their reach into private contacts between public officials and individual citizens. Extending the reach of the Act in the manner suggested would also be inconsistent with the constitutionally protected rights of our democratic process, including the right of citizens to instruct their representatives and petition their government for redress of grievances. (Cal. Const., Art. I, § 3(a).) Such a rule would obliterate the public/private divide in the lives of public officials and employees. For the greater good of public transparency and good governance, we demand that our public officials and employees make public certain information (salaries, economic interests, etc.) that a private person could keep private. However, we have never completely erased the dividing line between the public and private lives of public officials and employees. An expanded view of "public records" would mean all personal communications would have to be reviewed by the local agency to determine whether they relate to the public's business, thus

erasing the public/private divide in the lives of public officials and employees.

Third, an expansive interpretation of a "public record" may have a chilling effect on both citizens and public officials. Private citizens who wish to communicate with their representatives may not do so if they know that their private communications with their representatives will be open to public scrutiny. Similarly, the extension of the Act into the private writing of officials may have a chilling effect on people who would otherwise wish to serve the public.

For all of these reasons, the League, CASA, and CSDA urge the Court to adhere to the express definition of public records in the Act. This definition ensures broad disclosure of writings "prepared, owned, used or retained" by the local agency but does not require disclosure of writings which the local agency has not prepared, owned, used or retained. In addition, this case presents particular facts and should not be used as a vehicle for deciding broader issues that are better suited for legislative rather than judicial resolution. However, should the Court find that public officials' private communications on their private devices must be open to the public, the League, CASA, and CSDA urge the Court to place that burden of disclosure on the public officials who have access and control of those records, and are in the best position to disclose them.

## II.

## ARGUMENT

### A. THE ACT'S EXPRESS LANGUAGE IS CLEAR: THE GREATER PUBLIC AGENCY IS OBLIGATED TO DISCLOSE RECORDS UNDER THE ACT

At its core, this case presents simple questions of statutory interpretation—what constitutes a "local agency" under the Act, and whether City officials' private emails, text messages, and voicemails are "public records" of a local agency, as defined in the Act. Based on the Act's plain language, public officials are not a "local agency" and their private communications on private devices are not subject to the Act.

The Act provides that all public records of a local agency must be available for inspection and copying unless there is a legal basis not to disclose them. (Gov. Code, § 6253(a) and (b).) "Public records includes [sic] any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Gov. Code, § 6252(e).) Further, a "local agency includes a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; other public agency; or entities that are legislative bodies of a local agency pursuant to subdivisions (c) and (d) of Section 54952." (Gov. Code, § 6252(a).)

In statutory construction cases such as this one, courts have defined their role as follows:

> [O]ur fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history.

(*Marshall v. Pasadena Unified Sch. Dist.* (2004) 119 Cal.App.4th 1241, 1254, internal quotation marks and citations omitted.)

While courts interpret the Act broadly in order to promote its transparency goals (see, e.g., *San Gabriel Tribune v. Superior Ct.* (1983) 143 Cal.App.3d 762, 774), courts must not ignore the plain meaning of the language of the Act and must not add language to it. (*California State University v. Superior Ct.* (2001) 90 Cal.App.4th 810, 828-830 [when interpreting the definition of "state agency" in the Act, the court was limited by rules of statutory construction and could not rewrite the Act].)

When a statute is ambiguous, courts typically consider evidence of the Legislature's intent beyond the words of the statute. The court may examine a variety of extrinsic aids, including the statutory scheme of which the provision is a part, the history and background of the statute, the

apparent purpose, and any considerations of constitutionality, in an attempt to ascertain the most reasonable interpretation of the measure. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 776.)

The Act's definitions of "local agency" and "public records" are clear, and the Act's plain meaning should govern. But even if the Court looks to the Act's statutory scheme and the federal legislation on which the Act is modeled, it is apparent that individual public officials are not a "local agency," and individuals' private communications on private devices are not "public records."

### 1. INDIVIDUAL CITY OFFICIALS ARE NOT A "LOCAL AGENCY" SUBJECT TO THE ACT'S OBLIGATIONS

A "local agency" must make its records open to members of the public. (Gov. Code, § 6253(a).) The definition of "local agency" makes no mention of "individuals," "officials," or "employees." (Gov. Code, § 6252(a).) Rather, the plain meaning of the items listed under "local agency"—a "city," "municipal corporation," and "public entity"—denote an association of people or an organization with an identity separate from its members. (See, e.g., definition of "entity" at http://www.merriam-webster.com/dictionary/entity, last visited July 15, 2015; see also, e.g., *Mohamad v. Palestinian Auth.* (2012) 132 S. Ct. 1702, 1706-07 ["When a statute does not define a term, we typically give the phrase its ordinary meaning. As a noun, 'individual' ordinarily means '[a] human being, a

person,'" as opposed to a corporation or other organization].) As such, the Appellate Court correctly concluded, "The plain language of [Section 6252] thus denominates the legislative body as a whole; it does not appear to incorporate individual officials or employees of those entities. Had the Legislature intended to encompass such individuals within the scope of ['local agency'], it could easily have done so." (*Smith*, *supra*, 225 Cal.App.4th at p. 89.)

Moreover, the Appellate Court rightly rejected the assertion that public agencies are one and the same as their individual officials through whom the agencies act. The Act's statutory scheme consistently distinguishes between bodies and individuals that are each subject to different obligations and possess different rights under the Act. (Gov. Code, §§ 6253 (a) and (b) [the Act obligates "local agencies" to make "public records" available for inspection by any "person," or to provide copies to any "person;" 6253.1 [the Act gives "member[s] of the public" a right to assistance locating "public records" and obligates "local agencies" to provide the assistance].) The Legislature was not oblivious to the distinction between an "individual" and an "entity."

The Act's federal counterpart, the Freedom of Information Act (5 USCS § 552) ("FOIA") also supports the assertion that individual members are not a "local agency" under the Act. The Act was modeled after FOIA, which was enacted to establish a statutory right for citizens to gain access

to government information. (*Billington v. DOJ* (1998) 11 F.Supp.2d 45, 53 [overruled on other grounds.].) California courts may draw on FOIA for judicial construction and legislative history "in light of the lack of California cases construing the [Act]." (*San Gabriel Tribune v. Superior Ct.* (1983) 143 Cal.App.3d 762, 772.)

For example, in *Drake v. Obama*, the Ninth Circuit Court of Appeals upheld a district court's dismissal of FOIA causes of action brought against the U.S. President, his wife, the U.S. Vice President, and individual cabinet secretaries. ((9th Cir. 2011) 664 F.3d 774, 785-86.) No federal agency was named as a defendant. The Ninth Circuit explained that, under FOIA, the district court had jurisdiction "to enjoin *the agency* from withholding agency records and to order the production of any agency records improperly withheld from the complainant." (*Id.* at p. 785, italics in original.) As such, the FOIA claims did not apply to any of the individual defendants in *Drake*, because those individuals were not "agencies." (*Id.*) The Ninth Circuit reasoned, "[FOIA] concern[s] the obligations of agencies as distinct from individual employees in those agencies." (*Id.* at p. 786.)

Similarly, the Act concerns the obligations of a city as distinct from individual city officials in the city. Thus, both a plain reading and extrinsic examination of the Act support the assertion that individual public officials are not subject to the Act in the same way as the greater public entity.

### 2. CITY OFFICIALS' PRIVATE ELECTRONIC COMMUNICATIONS ARE NOT "PUBLIC RECORDS" OF A "LOCAL AGENCY" BECAUSE THEY WERE NOT "PREPARED, OWNED, USED, OR RETAINED" BY THE CITY

To constitute a public record subject to the Act, a writing must: (1) relate to the conduct of the public's business; and (2) be prepared, owned, used or retained by the local agency. (Gov. Code, § 6252(e).) If one of these two elements is missing, the writing is not a public record within the meaning of the Act.

Courts have held that mere custody of a writing (which was not present here) by a local agency does not mean that the writing is a public record within the meaning of the Act. (*Coronado Police Officers Ass'n v. Carroll* (2003) 106 Cal.App.4th 1001, 1006 (*Coronado*); *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 340.) In *Coronado*, the court held that a database compiled and maintained by the public defender's office, which consisted of information from client files as well as public records, was not a public record because the database's core function, to aid indigent criminal defendants, was a private, not a public, function. (*Coronado* at pp. 1006-07.) Similarly, in *Braun*, the court noted that items such as a "shopping list phoned from home" or "the letter to a public officer from a friend which is totally void of reference to governmental activities" contain purely personal information and are not public records even when in the custody of a local agency. (*Braun* at p. 340.)

Likewise, the Act's express definition of "public records" excludes writings that, while they may relate to issues of public interest, are not "prepared, owned, used, or retained by a state or local agency . . . ." (Gov. Code, § 6252(e).) Case law has recognized that this "control" element is one of the two required elements of a public record within the meaning of the Act.

For example, in *Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, the First Appellate District held that even though individual fund information held by the Regents' private fund management companies related to public business, the information was not a "public record" because it was not "prepared, owned, used, or retained" by the public agency. (*Id.* at p. 399.) In ruling that the information was not a "public record" under the Act, the First Appellate Court explained:

> [U]nless the writing is related 'to the conduct of the public's business' *and* is 'prepared, owned, used, or retained by' a public entity, it is not a public record under the CPRA, and its disclosure would not be governed by the Act. No words in this statute suggest that the public entity has an obligation to obtain documents even though it has not prepared, owned, used, or retained them. 'Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.'

(*Id.*, italics in original; citations omitted.)

A U.S. District Court similarly ruled that a federal agency need not search a federal employee's private "@columbia.edu" email account in response to a FOIA request because the emails were not in the agency's control. (*Competitive Enter. Inst. v. NASA* (2013) 989 F.Supp.2d 74, 86.) The District Court reasoned, "the agency does not have the ability to use and dispose of emails on the @columbia.edu domain as it sees fit," and "The Columbia University email system is entirely separate from the [agency's] email system. [Citation.] Only [the employee] has access to his @columbia.edu email account." (*Ibid.*)

The latter cases demonstrate that even if a writing may relate to public business, the record must still be "prepared, owned, used or retained by the local agency" to be deemed a "public record" within the Act's meaning. Applied here, the Act's express definition supports the City's assertion that individual Council members' private e-mails, voicemails, and text messages are not the City's public records. Those private electronic records are neither created nor received on City equipment or on City accounts, and the City does not otherwise have any control of or access to those private records.

The City's interpretation of the Act's definition of a "public record" is bolstered by the Act's treatment of information contained in an electronic format. (Gov. Code, § 6253.9.) The Act speaks of electronic information

in terms that emphasize the local agency's physical possession of and control over such records:

> (a) Unless otherwise prohibited by law, *any agency that has information* that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when requested by any person and, when applicable, shall comply with the following:
>
> (1) The agency shall make the information available in any electronic format in which *it holds the information.*
>
> (2) Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been *used by the agency* to create copies for its own use or for provision to other agencies....
> ....
>
> (c) Nothing in this section shall be construed to require the public agency to reconstruct a record in an electronic format *if the agency no longer has the record available* in an electronic format.
> ....
>
> (f) Nothing in this section shall be construed to require the public agency to release an electronic record in the electronic form in which *it is held by the agency* if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.
> ....

(Gov. Code, § 6253.9, italics added.)

As this case involves access to electronic records, the provisions of the Act governing access to such records are particularly instructive. Section 6253.9 unmistakably envisions a system of access to electronic records that are in the possession of the agency, not on the home computer or private personal device of a city council member. It bolsters the conclusion that the Act means what it says in limiting the definition of public records to records "prepared, owned, used, or retained" by the local agency.

In ruling for the City, the Appellate Court recognized that courts should not ignore the "prepared, owned, used, or retained" language found in the Act's definition of public records. Requiring public agencies to seek, retrieve, and sort through council members' and employees' records which were not "prepared, owned, used or retained" by the local agency would not be consistent with the plain meaning of the Act. Further, as explained below, there are ample reasons for the Court to steer clear of this invitation to rewrite the Act's definition of what constitutes a public record.

### B. THE EXPANDED DEFINITION OF "PUBLIC RECORDS" REQUESTED BY THE REAL PARTY IN INTEREST IS UNWORKABLE

The Act requires local agencies to make public records available for inspection and copying within a very short period of time. (Gov. Code, § 6253(a), (b) and (c).) The structure of the Act is only workable if public records are under the control of the local agency receiving the request. If

the local agency did not prepare, own, use or retain the document, it cannot produce it upon request. Indeed, the short timelines for response under the Act presuppose ready access to records being sought by a requester.

An expanded obligation to reach into private electronic devices and accounts would be infeasible to implement. Under Mr. Smith's proposal, a request for all public records relating to a matter pending before the agency would not only require the agency to diligently search the agency's own records, files and databases for responsive documents, it would also require the agency to search all of its employees' and officials' privately maintained personal computers, tablets, and cell phones—and not to mention private email and social networking accounts—for responsive records. While an agency has the ability to search for and produce documents under its control, it has no viable, legal means of searching for and producing private documents of its employees and officials or their service providers.

By way of example, assume that a city manager, outside of work hours, sends an e-mail from his home computer, using his private e-mail account, to his brother in Chicago. The e-mail sets forth, in addition to family updates and other personal information, the city manager's thoughts on a pending application to construct a Wal-Mart store in the city. The brother responds by e-mail, comments on the Wal-Mart application and refers to a similar application recently acted on in Chicago. The next day,

the city receives a Public Records Act request seeking all e-mails sent or received by city officials or employees in the last year related to the Wal-Mart application. Under the definition of public records set forth in the Act and under the Act's provisions regarding electronic information, the city would have to search for and produce all e-mails over which it had control. However, under an expanded mandate, the city would also be required to search all the private computers, cell phones, tablets, and other electronic devices of its employees and public officials.

Mr. Smith asserts that a public agency may simply ask its officials and employees to provide the requested data and information stored on their private devices. (OBM 18-19.) However, that view is oversimplified. If the city manager refused to consent to the city's search of his private computer, it is unclear what legal mechanism the city would have to force the manager to comply. A search warrant? A subpoena or other judicial order? Moreover, requiring a public agency to (potentially) litigate each time an employee or official refused to provide a record from a private device or account would prevent the agency from meeting the Act's disclosure deadlines.

Under a mandate to obtain private records, the city manager's simple lack of consent would cause the city to be out of compliance with the Act because it could not produce the e-mail to the brother in Chicago and the brother's e-mail response. If a plaintiff successfully sued the agency based

on the individual official's non-compliance, the agency—not the public official withholding the private records—would be responsible for the costs of suit. (See Gov. Code, § 6259(d) ["The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. *The costs and fees shall be paid by the public agency of which the public official is a member or employee and shall not become a personal liability of the public official.*" (Italics added).].) Public agencies have limited resources and cannot litigate every case in which an employee or official protests a private intrusion. Such a system is unworkable.

It is also important to recognize, as is the case here, that the plain language of the Act's definition of public records does not categorically insulate records sent from a private computer of a public employee or official. If the public official used his private computer to access his City-issued email account and transact City business, whatever record he produced on that government account could be disclosed under the Act since the City had possession or control over those records.

The real impact of an expanded view of a "public record" would, therefore, be on purely private electronic communications, and would extend the Act's reach into purely private discussions of public employees and officials with private persons, including even personal notes from friends that include some discussion of public issues. Neither the

Legislature nor the electorate has demonstrated any intent that the Act reach those purely private communications. Because that expanded approach is unworkable, it should be rejected.

### C. AN EXPANDED DEFINITION OF "PUBLIC RECORDS" IS INCONSISTENT WITH EXISTING LAWS AND OUR DEMOCRATIC SYSTEM

Our democratic system recognizes that there remains a public/private divide in the lives of public officials and employees. It is true that the California Supreme Court has made clear that public employees and officials have a diminished expectation of privacy when it comes to their positions as public employees and officials. (*Internat. Federation of Prof. and Technical Engineers, Local 21, AFL-CIO v. Superior Ct.* (2007) 42 Cal.4th 319, 331 (*Internat. Federation*).) In addition, under laws such as the Political Reform Act (Gov. Code, § 87100, et seq.), we require public officials and designated public employees to disclose what would otherwise be personal financial information. Finally, under the Brown Act, we require the public's business to be conducted publicly by legislative bodies of local agencies. (Gov. Code, § 54950, et seq.) However, our system (including the Act) has not obliterated the public/private divide in the lives of public officials and employees.

For example, the Brown Act provides that all meetings of the legislative body of a local agency shall be open and public. (Gov. Code, § 54953.) The California Supreme Court has stated that the Brown Act

serves the same democratic purposes of the California Public Records Act. (*Internat. Federation, supra*, 42 Cal.4th at 334 fn. 6.) However, in several instances, the Brown Act recognizes that the individual actions and communications of local officials are not the actions or communications of the local agency as the collective, and thus do not come within the purview of the Brown Act. The Brown Act specifically recognizes that it does not apply to "[i]ndividual contacts or conversations between a member of a legislative body and any other person." (Gov. Code, § 54952.2(c)(1).) Such individual contacts or conversations may lawfully occur outside of a public meeting and without public notice. This provision of the Brown Act is consistent with the right of citizens to instruct their representatives and petition their government for redress of grievances found in California Constitution, Article I, section 3(a).

Similarly, the Brown Act permits a meeting of less than a majority of the members of a legislative body to occur without public notice and outside of a public meeting. (Gov. Code, §§ 54952(b) and 54952.2(a).) Thus, even when those members are discussing the public's business among themselves, the law permits them to do so privately. Indeed, the ability of dissident members of a board to communicate among themselves confidentially is integral to the healthy functioning of our system of government. Sometimes such discussions are necessary to allow the airing

of unpopular views and the development of strategies for challenging the status quo or the powers that be.

A broader definition of public record is antithetical to these basic concepts that are so central to the Brown Act and the California Constitution. Under an expanded mandate, for example, a meeting between a public official and a constituent that would not be directly subject to public review under the Brown Act could be indirectly subject to public review under the Public Records Act, if the public official made notes of the meeting. This cannot be the rule. The twin pillars of open government law in California—the Public Records Act and the Brown Act—must be interpreted so as to be reasonably consistent with one another.

The expansive definition of "public record" also fails to acknowledge that in our democratic system, our elected officials (and sometimes our public employees) are also individual politicians. When acting as individual politicians, they are almost always engaged in communications involving public business. Our democratic system has traditionally separated the overlap between these dual roles (public official/politician) by making the use of public resources the dividing line. Stated more broadly, public officials and employees have the right to communicate their views on political issues (even to campaign) on their own dime and during their own time. Expanding the "public record" definition would significantly change this long-standing approach and

would place local agencies and the courts in the role of deciding, on a case-by-case basis, when a record is a public writing versus a private writing.

Although our democratic system and transparency laws carve out limited areas in which a public official may still act as a private citizen, there are significant checks and balances in the system to prevent rogue behavior by public officials under the guise of private action. Through the Act, a public official's otherwise private writings become subject to public scrutiny if they are "prepared, owned, used, or retained" by the local agency. Thus, if the public official sends the writing to a public agency, the writing becomes public. In addition, if the public official uses public resources to prepare or send the writing, the writing becomes public.

While transparency laws are an integral and fundamental part of our democratic process, those laws recognize that not all thoughts or records of individuals who participate as public officials in our democratic system are subject to them. The Act appropriately draws this fine line by defining a public record as one that relates to the public's business and is prepared, owned, used, or retained by the local agency. An expanded definition of "public record" destroys this line in a manner inconsistent with other transparency laws and the complex workings of our democratic process.

### D. AN EXPANSIVE INTERPRETATION OF "PUBLIC RECORD" MAY HAVE A CHILLING EFFECT ON CITIZENS AND PUBLIC EMPLOYEES AND OFFICIALS

Through its two-part definition of a public record, the Act allows individual employees and officials of local agencies to maintain a defined private space separate from their public position, and does not limit that private space to endeavors wholly unrelated to public business. When using public resources or providing information to the local agency, this private space is surrendered. However, consistent with the complexities of our democratic system and concepts of privacy rights, a public employee or official does not surrender his or her private space by accepting a public position.

Destroying this carefully crafted private space could have a chilling effect on citizens who wish to exercise their constitutional rights to instruct their representatives and petition government for redress of grievances. Private citizens who wish to communicate (via private e-mail or in writing) with their representatives may not do so if they know that their private communications with that representative may be open to public scrutiny. This could have the effect of cutting off important lines of communications between citizens and their representatives, thus undermining the democratic process.

Similarly, the extension of the Act into the purely privately maintained records of public employees or officials may have a chilling effect on people who would otherwise wish to serve the public through public employment or an official position. If to accept a public position in effect requires abandonment of a private life, many good people will refrain from seeking such positions. While the balance struck between a city council or board member's public and private space is not immutable, if there is to be any alteration of the rules governing the public/private divide in public officials' lives, the Legislature is best equipped and most appropriately suited to perform that task.

### E. THE COURT SHOULD PRESUME THAT PUBLIC OFFICIALS ARE NOT HIDING BEHIND PRIVATE TECHNOLOGY

The concern running throughout the public records discussion is that if the Court does not require public officials and employees to provide their personal records, those individuals will circumvent the law and privately carry out the public's business. (OBM 30.) However, the Court must presume that legislators regularly perform their official duties. (Evid. Code, § 664.) Here, that means the Court should presume that public officials are properly conducting agency business and not willfully dodging applicable transparency laws and regulations.

Even if the Court does not accept that presumption, there are a multitude of other laws that address transparency and ethics in government and governing. For example, the Brown Act governs open meetings, the Political Reform Act exhaustively covers campaign disclosures, lobbying, and conflicts of interests, and Government Code Section 1090 also covers certain financial conflicts of interests. The Act is certainly one component of ensuring an open and ethical government, but a judicial expansion of the statute will not and cannot be a panacea for solving the problem of potential wrongdoing by public officials and employees. If any change is needed, the Legislature is best positioned to consider the Act, the Act's interplay with other open government and ethics laws, and the role of emerging technology under those laws.

### F. THE COURT SHOULD BE CAUTIOUS IN MAKING BROAD RULINGS AFFECTING THE ROLE OF EMERGING TECHNOLOGY IN SOCIETY

Indeed, the Nation's highest court has cautioned against sweeping court rulings on the issue of individuals' privacy expectations and technology. In *City of Ontario v. Quon*, a police officer sued his police department employer after the officer's supervisors reviewed transcripts of messages he sent and received from his department-issued pager. (*City of Ontario v. Quon* (2010) 130 S. Ct. 2619.) A point of contention was whether the officer had a reasonable expectation of privacy in his messages, even though the pager was employer-issued. The U.S. Supreme Court side-

stepped the issue and stated that it wished to proceed with care in the area of privacy expectations in communications made on electronic equipment owned by a government employer:

> [T]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.... Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.

(*Id.* at p. 2629.) The Supreme Court avoided handing down a "broad ruling [that] might have implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrower grounds."

If the U.S. Supreme Court believes there is a colorable argument that public employees have a reasonable expectation in their *government*-issued electronic devices, the argument is even more potent that public officials and employees have a reasonable expectation of privacy in their *private* electronic devices, as is the case here.

More recently, the U.S. Supreme Court limited intrusive, warrantless searches of cell phones and found that even suspected criminals have privacy expectations in their personal devices. (*Riley v. California* (2014) 134 S. Ct. 2473.) In *Riley*, the U.S. Supreme Court unanimously held that police officers generally could not, without a warrant, search digital information on cell phones seized from criminal suspects as an incident to

the suspects' arrests. (*Id.*) Though criminal suspects have a diminished privacy interest, "that does not mean that the Fourth amendment falls out of the picture entirely." (*Id.* at p. 2488.) The Supreme Court explained:

> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans, 'the privacies of life.' [Citation.] The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.

(*Id.* at pp. 2494-95.)

Here, though public officials and employees may have a diminished privacy interest, their public position does not eviscerate their Fourth Amendment rights to data stored on their personal devices. As the U.S. Supreme Court has noted, the judiciary should proceed cautiously when ruling on evolving technology because of the far reaching ramifications such decisions will have.

### G. THIS CASE PRESENTS PARTICULAR FACTS AND SHOULD NOT BE USED AS A VEHICLE FOR DECIDING BROADER ISSUES THAT ARE BETTER SUITED FOR LEGISLATIVE RATHER THAN JUDICIAL RESOLUTION

Greater issues are implicated by the facts of this case, and the League, CASA, and CSDA emphasize the importance of judicial restraint because these larger issues are better suited for, and more appropriately resolved by the Legislature.

The facts of the case are limited in at least three ways that are significant. First, the public official here is a member of a city council, that is, a multi-member legislative body. The Court's decision therefore need not address—directly or by implication—the application of the Act to those public officials (and there are many) who are not members of a multi-member legislative body. Second, the communications at issue are exclusively with a governmental entity that is itself subject to public records laws. The Court's decision therefore need not address—directly or by implication—other types of possible communications entered into by a public official. Third, the communications at issue involve a particular medium—electronic mail and messages.

The first and third factors especially illustrate why the larger issues raised by this case would be best resolved by the Legislature. The role of a member of a multi-member governmental body is complex because the official functions both as part of a deliberative body that exercises power collectively, and as a lone individual, or sometimes as part of a group that is a minority within the body. The Brown Act demonstrates the Legislature's capacity to set many different types of rules that take into account the many hats a member of a legislative body wears. In contrast, courts are not institutionally well-suited to set policy and are not meant to engage in the type of line-drawing and fine-tuning that is the bread-and-butter of the Legislature and that is particularly appropriate in the context of access to

public records. Even as basic a distinction as that between members of elected legislative bodies and appointed legislative bodies can be easily drawn by the Legislature, with potentially different rules governing the two types of legislative bodies. The leeway of courts to draw such distinctions is much more circumscribed.

For a variety of reasons, electronic communications pose interesting and important challenges for public records law. Indeed, in the public records context, as has been noted, the Legislature has already taken some major steps in regulating electronic records. If there have been electronic records abuses by public officials to evade the Act—and we do not in any way imply that that is the case here—there are a variety of possible legislative remedies that would be far preferable than distorting the concept of a public record and judicially rewriting the Act to achieve a particular result in one case. Indeed, the Legislature is far better equipped than a court to ascertain if there is a significant problem of e-mail abuses that warrant amendment of the Act.

### H. IF THE COURT DOES NOT AFFIRM THE APPELLATE COURT RULING, THE RESPONSIBILITY TO DISCLOSE SHOULD BE PLACED ON INDIVIDUAL PUBLIC OFFICIALS

This brief has discussed in detail that it would be impracticable and burdensome to place on public agencies the responsibility to seek out private communications on private devices to disclose to the public. *Amici*

have also urged the Court to allow the Legislature to amend the Act, as needed. However, if the Court rules that private communications recorded on personal devices and relating to public business are public records, *Amici* ask the Court to place the responsibility to disclose on the most capable party: the public official. It is the *individual official* that has prepared, owned, used, or retained the record on his or her personal device, and therefore, he or she is in the best position to disclose that record. Public agencies like the City are neither equipped with the physical resources nor the legal authority to access private individuals' communications and accounts. Requiring public agencies to police public officials' private electronic devices and accounts would further tax agencies' limited staff and resources and increase the agencies' liabilities. Individual officials and employees should bear the burden of disclosing their private communications relating to public business to the public.

## III.

## CONCLUSION

For all the reasons set forth above, the League, CASA, and CSDA respectfully request that the Court affirm the Appellate Court's decision.

Dated: July 22, 2015

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By: _____

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## CERTIFICATE OF WORD COUNT

I certify that the text of this brief consists of 7,696 words as counted by the Microsoft Word word-processing program used to generate the brief

Dated: July 22, 2015

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## PROOF OF SERVICE

COURT OF APPEALS CASE NO.: H037626; SCC #1-7-CV-089167)

I, Kerry V. Keefe, declare:

I am a citizen of the United States and employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 18101 Von Karman Avenue, Suite 1000, Irvine, California 92612. On June 22, 2015, I served a copy of the within document(s):

**APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND [PROPOSED] BRIEF OF LEAGUE OF CALIFORNIA CITIES, CALIFORNIA ASSOCIATION OF SANITATION AGENCIES, AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION IN SUPPORT OF CITY OF SAN JOSE**

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Irvine, California addressed as set forth below. *

☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below. **

SEE ATTACHED

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 22, 2015, at Irvine, California.

Kerry V. Keefe

**PROOF OF SERVICE (CON'T.)**

CASE NAME: Ted Smith v. City of San Jose, et al.

COURT OF APPEALS CASE NO.: H037626; SCC #1-7-CV-089167)

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